BEFORE THE
U.S. DEPARTMENT OF THE INTERIOR
MINERALS MANAGEMENT SERVICE

Open and Non-Discriminatory Movement	)	MMS Advance
Of Oil and Gas As Required by the	)	Notice of
Outer Continental Shelf Lands Act	)	Proposed Rulemaking

COMMENTS OF THE PRODUCER COALITION

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COMMENTS OF THE PRODUCER COALITION

The Producer Coalition submits these comments in response to the Advance Notice of Proposed Rulemaking on Open and Non-Discriminatory Movement of Oil and Gas on the Outer Continental Shelf as Required by the Outer Continental Shelf Lands Act ("Advance NOPR"), issued by the Minerals Management Service ("MMS") on April 12, 2004.[1]

We support the MMS' efforts to gather information from stakeholders and the public regarding a regulatory regime to fill the void left by *Williams Cos. v. FERC*, 345 F.3d 910 (D.C. Cir. 2003) ("*Williams*"), which held that the Federal Energy Regulatory Commission ("FERC") has no general rulemaking authority to implement Section 5(f)(1)(A) of the Outer Continental Shelf Lands Act ("OCSLA"). As stated in our presentations at the MSS-sponsored public workshops, we advocate light-handed regulation of OCS pipelines (hereinafter sometimes referred to as "service providers"), similar to what the FERC previously attempted and MMS supported.[2] That regulatory scheme would consist of reporting requirements and complaint procedures administered by the MMS to permit shippers of oil and gas on the OCS to obtain speedy and effective redress for violations of the open and non-discriminatory access requirement of Section

[1] 69 Fed. Reg. 19,137 (April 12, 2004).

[2] See comments of the MMS filed August 26, 1999 in support of the FERC's proposed reporting requirements for OCS gas pipelines, attached hereto as Appendix A.

5(f)(1)(A). For the reasons stated below, both the reporting requirements and the complaint procedures are essential.

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NATURE OF INTEREST

The Producer Coalition is an *ad hoc* group of companies engaged in exploring for, developing, and marketing crude oil and natural gas on the OCS in the Gulf of Mexico and other producing basins. For purposes of this rulemaking, the Producer Coalition consists of Dominion Exploration & Production, Inc., The Houston Exploration Company, Newfield Exploration Company, Spinnaker Exploration Company, and TOTAL E&P USA, Inc. Our members have significant investment in oil and natural gas production projects on the OCS and are shippers of oil and gas on numerous OCS pipelines. On a cumulative basis, we market or ship over 1.1 Bcf of gas per day and over 46,000 barrels of oil per day on OCS pipelines.

We have actively supported open and non-discriminatory access on OCS pipelines under Section 5(f)(1)(A) since 1997, and have consistently advocated reporting requirements and complaint procedures, first before the FERC,[3] and now before the MMS in light of the *Williams* decision.

[3] *Regulations Under the Outer Continental Shelf Lands Act Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf*, 65 Fed. Reg. 20354, 20357–68 (Apr. 17, 2000).

COMMENTS

We have divided our comments into three parts. Part I provides legal background on pipeline regulation under Section 5, including the conduct addressed by Section 5(f)(1)(A); the coverage of production handling services; changes in regulatory schemes under other statutes that affect the need for regulation under Section 5(f)(1)(A); and a review of the statutory delegation of authority to the MMS to administer Section 5(f)(1)(A).

In Part II, we set forth the details of the program that we advocate, describing a proposed form for initial reports, a proposed form for supplemental reports, and proposed complaint procedures to be implemented by the MMS. The proposed forms and procedures themselves appear in Appendices B through D.

Part III offers answers to specific questions posed by the MMS Staff in the Advance NOPR, and by the MMS Staff and others in the public workshops.

I. BACKGROUND: PIPELINE REGULATION UNDER THE OCSLA.

A. Congress Has Long Recognized the Importance of OCS Pipelines and the Need to Curb Their Market Power.

All of the natural gas production from the OCS and most of the oil production depends on pipelines for transfer from OCS platforms to shore. Because it is costly and inefficient to construct multiple pipeline connections to OCS production platforms, producers are typically captive to a single pipeline to move their production to shore. Thus OCS pipelines are natural monopolies in a position to exercise market power over shipments of OCS oil and gas production.

Recognizing both the importance and the power of the pipelines, Congress in drafting the original OCSLA required OCS pipelines to purchase or transport oil or gas in the vicinity of such

pipelines "without discrimination."[4] Later, as oil and gas development on the OCS advanced, Congress added Section 5(f) to the statute in the 1978 Amendments as a "reaffirmation and strengthening of [former Section 5(c)]."[5] Section 5(f)(1)(A) requires OCS oil and gas pipelines to "provide open and nondiscriminatory access to both owner and nonowner shippers."[6] That provision was intended to "prevent 'bottleneck monopolies' and other anticompetitive situations involving OCS pipelines."[7]

Thus, Section 5(f)(1)(A) advances several Congressional objectives. It helps maximize the efficient development of OCS resources by assuring open access, it helps avoid the economic distortions and environmental harm attendant to unnecessary duplication of pipeline facilities, and it provides a competitive structure for the offering of OCS pipeline services.

In addition, Congress highlighted the critical role played by OCS pipelines in defining "production" in Section 2(m) of the 1978 OCSLA Amendments to include the removal of minerals (*i.e.*, oil or gas) *and* the "transfer of minerals to shore," thus emphasizing the reality of OCS

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[4] Section 5(c), as originally enacted in 1953, provided in pertinent part:

> (c) Rights-of-way through the submerged lands of the outer Continental Shelf, whether or not such lands are included in a lease maintained or issued pursuant to this Act, may be granted by the Secretary for pipeline purposes for the transportation of oil, natural gas, sulphur, or other mineral under such regulations and upon such conditions as to the application therefor and the survey, location and width thereof as may be prescribed by the Secretary, and upon the express condition that such oil or gas pipelines shall transport or purchase without discrimination, oil or natural gas produced from said submerged lands in the vicinity of the pipeline in such proportionate amounts as the Federal Power Commission, in the case of gas, and the Interstate Commerce Commission, in the case of oil, may, after a full hearing with due notice thereof to the interested parties, determine to be reasonable, taking into account, among other things, conservation and the prevent of waste. . . .

Outer Continental Shelf Lands Act, Pub. L. No. 83-212, ch. 345, § 5(c), 1953 U.S.C.C.A.N. (67 Stat. 464) 506, 508.

[5] H.R. CONF. REP. NO. 95-1474, at 87, *reprinted in* 1978 U.S.C.C.A.N. 1450, 1686

[6] 43 USC § 1334 (2002).

[7] H.R. CONF. REP. NO. 95-1474, at 87, *reprinted in* 1978 U.S.C.C.A.N. 1450, 1686. Antitrust principles require that the owners of "bottleneck" or "essential facility" monopolies, such as pipelines, provide access on fair terms. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 377–78 (1973); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992–93 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

operations that without access to transportation by pipelines, there can be little or no removal of oil and gas from the OCS.

B. Section 5(f)(1)(A) Guarantees Both "Open" and "Nondiscriminatory" Access

1. "Open" access means both physical access *and* access on reasonable economic terms.

The open access and nondiscriminatory commands of Section 5(f)(1)(A) operate independently and complement each other in assuring a competitive climate for OCS pipeline services.

Open access guarantees shippers not only *physical access* to pipeline capacity,[8] but also *access on reasonable economic terms*.[9] That is because prohibitively high rates are tantamount to denial of physical access. Even uniform rates and conditions of service can result in the denial of reasonable economic access, particularly if shippers lack effective transportation alternatives.[10] Accordingly, although the OCSLA does not purport directly to regulate rates -- unlike the Natural Gas Act ("NGA") and the Interstate Commerce Act ("ICA"), which require just and reasonable rates for the interstate transportation of natural gas and oil -- Section 5(f)(1)(A)'s open access requirement *does* reach rates that effectively deny reasonable economic access.

2. "Nondiscriminatory" access means equal treatment of similarly-situated shippers and no division of markets.

The nondiscriminatory access requirement is intended to assure that similarly-situated shippers are treated the same. Thus it protects shippers against division of markets by monopoly service providers who, absent restraint, might divide their markets, offering favorable economic

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[8] *See, e.g., Shell Oil Co. v. FERC*, 47 F.3d 1186, 1196 (D.C. Cir. 1995) (upholding claim of denial of physical access to pipeline capacity under Section 5(f)(1)(A) of the OCSLA); *Bonito Pipe Line Co.*, 61 FERC ¶ 61,050, at 61,221 (1992).

[9] *Shell Offshore Inc. v. Transcontinental Gas Pipeline Corp. et al.*, 103 FERC ¶ 61,177 at par. 38 (2003) (holding that denial of reasonable economic access amounts to violation of Section 5(f)(1)(A) of the OCSLA).

[10] *Id.*

terms to shippers with economic leverage, and extracting monopoly rents (effectively subsidizing the well-positioned shippers) from captive shippers that lack significant bargaining power. The ban on discrimination is intended to level the playing field, requiring the monopoly service provider to offer all shippers the same terms or, alternatively, to provide legitimate justification for any differences in treatment.

C. Transportation Under Section 5(f)(1)(A) Includes Production Handling Services Performed Downstream of the Wellhead that are Essential to the Movement or Continued Movement of Oil or Gas Across the OCS.

"Transportation by pipeline" of oil or gas on or across the OCS, as used in Section 5(f)(1)(A), encompasses all movement of oil or gas through pipelines downstream of the wellhead. That includes production handling services necessary to the movement or continued movement of oil or gas through OCS pipelines. The typical production handling services are separation of liquids, dehydration, compression, measurement and associated disposal of salt water removed from the production stream. Access to production handling services is critical to access to pipelines, for without those services, oil or gas will not be permitted to move or continue to move across OCS pipelines to shore.

The contrary position of the Indicated Producers[11] -- that production handling services are outside the scope of Section 5(f)(1)(A) -- reflects an unsupportable interpretation of the statute and has been squarely rejected by the FERC. See *Regulations Under the Outer Continental Shelf Lands Act Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf*, 93 FERC ¶ 61,274 (2000) (holding that production handling services are a part of transportation of oil or gas by pipeline across the OCS); *accord Shell Deepwater Dev., Inc.*, 97 FERC ¶ 61,216 (2001). The Indicated Producers do not -- and cannot -- dispute that production handling services are essential to

[11] The Indicated Producers consist of Shell Offshore Inc., ExxonMobil Gas & Power Inc., Chevron Texaco Inc., and BP Energy Inc. Their position on production handling services was presented at the public workshops in this proceeding.

the movement or continued movement of oil or gas by pipeline across the OCS. Instead, they argue that (i) production handling facilities are not "pipelines" within the contemplation of Section 5(f)(1)(A); (ii) production handling services are not transportation but are part of "production," which is not completed until oil or gas has been treated on an OCS platform and is ready to be injected into a pipeline to carry it to shore; and (iii) production handling facilities do not actually "move" oil or gas across the OCS and are therefore are not used for "transportation" under Section 5(f)(1)(A).

Those arguments are soundly refuted by the language, structure, and purpose of Section 5(f). A statute must be interpreted to give effect to the meaning of its terms in light of Congress' intent. *See, e.g., Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979); *Arnold v. United Parcel Serv.*, 136 F.3d 854, 861 (1st Cir. 1998). Section 5(f)(1)(A) is a remedial statute and should be interpreted broadly to effectuate Congress' intent to "prevent bottleneck monopolies and other anti-competitive situations" in pipeline services on the OCS. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

The Indicated Producers point to no authority for the proposition that "transportation by pipeline" under Section 5(f)(1)(A) excludes production handling services downstream of the wellhead. To the contrary, in its administration of the NGA, the FERC has consistently ruled that treating facilities located along interstate pipelines that provide separation, dehydration or compression services essential to the continued movement of gas in interstate commerce are properly classified as jurisdictional "transportation" facilities.[12] The same rationale applies with

[12] *See Columbia Gas Transmission Corp.*, 79 FERC ¶ 61,041 (1997) (recognizing distinction between jurisdictional "treating" facilities used to condition gas for continued movement in interstate commerce, and non-jurisdictional "processing" facilities used to extract liquid hydrocarbons for their economic value). *Accord Texas Eastern Transmission Corp.*, 43 FERC ¶ 61,044 (1988); *Pacific Offshore Pipeline Co.*, 14 FERC ¶ 61,239A (1981), *reh'g denied*, 15 FERC ¶ 61,235 (1981); *Natural Gas Pipeline Co. of America*, 26 FERC ¶ 61,282 (1984).

equal force to the production handling services performed on OCS platforms that are essential to preparing gas or oil for injection into downstream pipelines.

Unlike the NGA, Section 5(f)(1)(A) does not distinguish movements downstream of the wellhead into those that are "gathering" and those that are "transportation."[13] Rather, it speaks broadly in terms of "transportation by pipeline." Thus, by its plain terms, the provision covers *all* movement of oil or gas on or across the OCS downstream of the wellhead.

The interrelationship of Sections 5(f)(1)(A) and 5(f)(2) confirms this interpretation. Section 5(f)(1)(A) establishes the competitive principles of open and non-discriminatory access applicable to all transportation of oil or gas by pipeline on or across the OCS. Section 5(f)(2) then allows the FERC to exempt from the competitive principles certain feeder lines that run from the wellhead to platform facilities where oil or gas is "first separated, dehydrated, or otherwise processed." 43 U.S.C. § 1334(f)(2). The Indicated Producers' argument that "transportation by pipeline" starts downstream of the platform treatment facilities referred to in Section 5(f)(2) would read Section 5(f)(2) out of the statute.[14]

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[13] Nor does the OCSLA differentiate between "production" and "transportation" as suggested by the Indicated Producers. Transportation is not defined in the statute, and "production" is defined broadly in Section 2(m) to include not only the removal or severance of minerals but the "transfer of minerals to shore" after such removal. In this light, the transportation of oil or gas – *i.e.*, the "transfer of such minerals to shore after removal" -- starts at the wellhead and continues across the OCS.

[14] Similarly, just as "transportation by pipeline" runs from wellhead to shore, so too do the "permit[s], license[s], easement[s], right[s]-of-way, or other grant[s] of authority for transportation by pipeline" to which the competitive principles in Section 5(f)(1)(A) attach. For pipelines that are operated off-lease, the authorizations take the form of easements or rights-of-way. For pipelines that a lessee owns and operates on-lease, the authorizations arise from the lease itself and the lease development and safety plans for operation of the lease which require MMS approval and which specifically include pipeline equipment to be placed on the lease. *See, e.g.*, 30 C.F.R. § 250.204(d)(1). Thus, within the ambit of "permit[s], license[s], easement[s], right[s]-of-way, or *other grant[s] of authority for the transportation by pipeline*" [i.e., leases, development plans and safety plans], there is a seamless blanket of authorizations covering the movement of oil or gas by pipeline from wellhead to shore across the OCS.

For similar reasons, the Indicated Producers' argument that production handling facilities are not involved in the "movement" of oil and gas to shore is also unavailing. The FERC rejected that position in a Clarifying Order subsequent to Orders 639 and 639-A:

> Amoco argues we lack authority over offshore platform facilities because they are not used to move gas on or across the OCS. We concede that the progress of gas from wellhead toward shore is, as a strict physical measure, only incrementally advanced as gas proceeds from the inlet to the outlet of platform processing or compression facilities. Nevertheless, the process of treating gas to bring it up to certain quality standards is a necessary part of the process of moving gas on or across the OCS. There are any number of specific facilities, *e.g.*, meters and valves, that, when viewed in isolation, do not actually carry volumes forward, yet are reasonably considered appurtenant to the process of transporting gas to market. PHA facilities, by treating, conditioning, processing, or compressing gas, perform a service essential to promote the movement of gas. Accordingly, we reject Amoco's assertion that PHA facilities are not engaged in moving gas on or across the OCS within the meaning of the OCSLA.

Regulation Under the Outer Continental Shelf Lands Act Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf, 93 FERC ¶ 61,274, at 61,888 (2000).

Finally, our interpretation comports with and furthers Congress' intent in the 1978 OCSLA Amendments to avoid bottleneck monopolies in pipeline services on the OCS. [15] Because production handling facilities can serve as bottlenecks in the movement of oil and gas to shore, "transportation by pipeline" under Section 5(f)(1)(A) should be read to include production handling services downstream of the wellhead that are essential to the movement or continued movement of oil or gas across pipelines on the OCS.

D. Section 5(f)(1)(A) Has Gained Increased Importance Since the Mid-1990's with Regulatory Changes Under the NGA and ICA.

Little regulatory activity initially occurred under Section 5(f)(1)(A) because the NGA was generally viewed as regulating most gas pipeline facilities on the OCS, and most OCS oil pipelines

[15] H.R. CONF. REP. No. 95-1474, at 87 (1978), *reprinted in* 1978 U.S.C.C.A.N. 1450, 1686.

had tariffs on file with the FERC under the Interstate Commerce Act ("ICA"). Both the NGA and the ICA provide comprehensive schemes for regulating pipelines that, in addition to barring undue discrimination, require that all pipeline rates and conditions of service be just and reasonable.

But shippers' ability to rely on the NGA and ICA changed in the 1990s. In the wake of gas industry restructuring, a line of FERC decisions beginning in the mid-1990s ruled that substantial portions of OCS gas pipelines were no longer subject to NGA regulation, but instead were non-jurisdictional "gathering" facilities.[16] According to a study commissioned by the Interstate Natural Gas Association of America in 1998, almost half of the gas pipelines located on the OCS at that time were non-jurisdictional gathering facilities.[17] Similarly, in the early 1990s, the FERC determined that oil pipelines located solely on the OCS are not subject to regulation under the ICA.[18]

As a result of these changes, beginning in mid-1999 the FERC took action to implement Section 5(f)(1)(A) with respect to OCS gas pipelines by instituting a scheme of light-handed regulation made up of reporting requirements for service providers and complaint procedures to allow shippers to seek redress for denial of open and non-discriminatory access. *Regulations under the Outer Continental Shelf Lands Act Governing the Movement of Natural Gas on Facilities on the*

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[16] *See, e.g., Viosca Knoll Gathering System*, 66 FERC ¶ 61,237 (1994); *Shell Gas Pipeline Co.*, 74 FERC ¶ 61,219 (1996); *Shell Gas Pipeline Co.*, 74 FERC ¶ 61,277 (1996); *Sea Robin Pipeline Co.*, 71 FERC ¶ 61,351 (1995), *reh'g denied*, 75 FERC ¶ 61,332 (1996), *vacated and remanded, Sea Robin Pipeline Co. v. FERC*, 127 F.3d 365 (5th Cir. 1997), *order on remand*, 87 FERC ¶ 61,384 (1999), *reh'g denied*, 92 FERC ¶ 61,072 (2000), *aff'd, ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1081 (D.C. Cir. 2002), *cert. denied sub nom. Producer Coalition v. FERC*, 124 S. Ct. 47 (2003). *See also Statement of Policy, Gas Pipeline Facilities and Services on the Outer Continental Shelf – Issues Related to the Commission's Jurisdiction Under the Natural Gas Act and the Outer Continental Shelf Lands Act*, 74 FERC ¶ 61,222 (1996).

[17] "*Gulf of Mexico Natural Gas Resources and Pipelines Infrastructure - 1998*," INGAA Foundation, Inc., pp. IV-9-10.

[18] *Bonito Pipeline*, 61 FERC ¶ 61,050, at 61,221 (1992); *Oxy Pipeline*, 61 FERC ¶ 61,051, at 61,227-28 (1992).

Outer Continental Shelf, Order No. 639, Regulations Preambles 1996-2000 FERC Stats. & Regs. ¶ 31,097, *order on reh'g*, Order No. 639-A, Regulations Preambles 1996-2000 FERC Stats. & Regs. ¶ 31,103 (2000) (hereinafter "Order Nos. 639 and 639-A"), *vacated, Chevron U.S.A, Inc. v. FERC*, 193 F. Supp. 2d. 54 (2002), *aff'd sub nom., Williams Cos. v. FERC*, 345 F.3d 910 (D.C. Cir. 2003). The MMS supported the FERC's efforts to bring transparency to non-NGA-jurisdictional gas pipelines, noting that the FERC's proposal represented the "minimum" necessary to implement Section 5(f)(1)(A). (MMS Comments attached hereto as Appendix A, p. 1.) But the courts struck down the FERC's program, ruling that Congress had not delegated general rulemaking authority to the FERC to implement that provision. *Williams*, 345 F.3d 910.

E. Congress Delegated Authority to the MMS to Implement Section 5(f)(1)(A).

In blocking the FERC's effort to regulate under Section 5(f)(1)(A), the D.C. Circuit impliedly found that Congress had delegated general rulemaking authority to implement Section 5(f)(1)(A) to the Secretary of the Interior ("Secretary") as the administrator of the OCSLA and grantor of leases. *See* 345 F.3d at 913 (noting that Congress presumably intended the Secretary, as the obligee of conditions issued with the leases, rights-of-way or other grants of authority, to be responsible for enforcement of the nondiscrimination provision in Section 5(e) and 5(f)). The language of Section 5 fully supports that view.

Congress granted broad regulatory authority to the Secretary under Section 5. First, the Secretary has plenary authority over "leasing": Section 5(a) states that the Secretary "shall administer the provisions of [the OCSLA] relating to the leasing of the outer Continental Shelf, and *shall prescribe such rules and regulations as may be necessary to carry out such provisions.*" 43 U.S.C. § 1334(a) (emphasis added). Section 5, of course, includes the pipeline provisions in Section 5(f)(1)(A).

Second, the Secretary has authority over "production." Section 5(a)(6) authorizes the Secretary to prescribe regulations "for drilling or easements necessary for exploration, development, and production." "Production" is defined in Section 2(m) to include the "transfer of minerals (*i.e.*, oil and gas) to shore." Thus, the Secretary has authority to prescribe regulations governing the transfer of oil and gas to shore by pipeline.

The authority delegated to the Secretary in Section 5(a) to "prescribe such rules and regulations as may be necessary to carry out" Section 5 includes the authority to establish complaint procedures and fashion remedies for violations of Section 5(f)(1)(A) of the OCSLA and the regulations thereunder. The courts have long recognized that an agency's discretion is "at [its] zenith" when exercised to fashion "policies, remedies and sanctions, including enforcement . . . to arrive at maximum effectuation of Congressional objectives." *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967). *See also, e.g., Purepac Pharm. Co. v. Torpharm, Inc.*, 354 F.3d 877, 889 (D.C. Cir. 2004); *cf. ICC v. American Trucking Ass'n*, 467 U.S. 354, 367 (1984). The Secretary has delegated to MMS the Secretary's broad authority to administer Section 5 pursuant to an internal reorganization of the Department of the Interior in 1982.

II. OUR PROPOSAL FOR A SCHEME OF LIGHT-HANDED REGULATION.

A. The Need for Transparency and Enforcement on OCS Pipelines Is As Critical As It Was in 1999.

MMS's reasons for supporting the FERC's scheme of light-handed regulation as the "minimum needed" to implement Section 5(f)(1)(A) are no less valid now than they were in 1999. Indeed, the need for OCSLA regulation is even more compelling today. As a result of the FERC's spin-down activities, particularly with respect to a number of significant OCS gas pipelines formerly owned by Transcontinental Gas Pipe Line Corporation ("Transco"), there are many more miles of non-jurisdictional pipeline on the OCS than there were in August 1999. In addition, OCS oil

pipelines that formerly had tariffs on file at the FERC under the ICA have now cancelled them in light of the *Bonito Pipeline* ruling. *See, e.g., American Petrofina Pipe Line Co.*, FERC Docket No. IS04-164-001 (Letter Order Issued Apr. 16, 2004); *Jolliet Pipe Line Co.*, FERC Docket No. IS04-126-001 (Letter Order Issued Apr. 8, 2004) (pipeline operated by Conoco); *BP Offshore Pipelines, Inc.*, FERC Docket No. IS04-82-002 (Letter Order Issued Mar. 10, 2004).

The withdrawal of NGA and ICA oversight has fueled the potential for monopoly abuses by OCS pipelines, warranting attention under Section 5(f)(1)(A). A textbook example occurred immediately after Transco's spin-down in late 2001of its former North Padre Island ("NPI") facilities to its affiliate Williams Gas Processing ("WGP"). WGP immediately instituted an exponential rate increase, raising some shippers' rates almost four-fold and demanding that all shippers dedicate their remaining production to WGP. In response, Shell Offshore Inc. shut in its production and filed a complaint against Transco and WGP at the FERC, seeking reassertion of NGA jurisdiction based on unlawful concerted action between Transco and its affiliate. A second shipper, Walter Oil & Gas, sought relief before the FERC under Section 5(f)(1)(A) for denial of reasonable economic access to the pipeline and unlawful rate discrimination. The FERC ruled that WGP had violated Section 5(f)(1)(A) by (i) demanding a life-of-the-lease dedication and charging rates so high as to deny shippers reasonable economic access to WFS' pipeline, and by (ii) unlawfully discriminating between shippers on rates over the newly spun-down NPI facilities. *Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corp.*, 103 FERC ¶ 61,177 (2003), *review pending, Williams Gas Processing v. FERC*, No. 03-1179 (D.C. Cir., filed June 27, 2003). With the intervening decision of the D.C. Circuit in *Williams*, however, the FERC's authority to address the OCSLA claims is in doubt. Action by the MMS is necessary to fill the void left by *Williams* and to effectuate Congress' intent to prevent monopoly abuse by OCS pipelines.

B. A Reporting Scheme Is Essential to the Detection, As Well As Prevention, of Discrimination.

Without readily available information from service providers, shippers and the MMS have no way of knowing whether discrimination has taken place. Thus the MMS supported the FERC's proposed reporting requirements in Order Nos. 639 and 639-A as the "minimum" regulation necessary to implement Section 5(f)(1)(A). *See* MMS Comments at 1.

The MMS should not infer that regulation of OCS pipelines is unnecessary simply because of shippers' failure to cite specific incidents of past discrimination. In fact, information on pipeline's rates and terms of service is not readily available to shippers. Moreover, many service providers insist on contractual confidentiality provisions that prohibit shippers from exchanging information with other shippers regarding contract terms for transportation service. Thus, although we know of some incidents of discrimination (*e.g., Shell Offshore*, 103 FERC ¶ 61,177), there is no reliable way to gauge the extent of such conduct. Absent the mandatory disclosure of material contract terms offered to other shippers, pipeline transportation service is a black box: shippers have no means of ascertaining whether they have been offered service on a nondiscriminatory basis, as required by Section 5(f)(1)(A).

The transparency we seek will not only reveal possible violations but also will foster compliance in the first place, for companies required to report information will be deterred from engaging in discriminatory practices or denying access. That will help to avoid future incidents of discrimination, and limit the number of discrimination complaints.

The FERC's Order No. 639 summed up the benefits of transactional reporting requirements:

> Making information regarding conditions of service available to OCS shippers will enable them to make informed and improved transportation arrangements; will enable OCS service providers to make better investment decisions; and will allow shippers, competitors, and the Commission to monitor the OCS for instances of

> discrimination and the exercise of market power. *These benefits are unavailable without the transactional transparency provided by the OCSLA reporting requirements* . . . . Making information publicly available that has heretofore been largely inaccessible should enhance competitive options for offshore producers and onshore purchasers . . ., promote a more efficient marketplace, and encourage the continued exploration and development of offshore resources.

Order No. 639, Regulations Preambles 1996-2000 FERC Stats. & Regs. ¶ 31,097 at 31,515 (emphasis added).

C. The MMS Should Adopt Complaint Procedures to Complement the OCS Pipeline Reporting Requirements.

Transparency and enforcement go hand-in-hand, and both are essential to an effective regulatory scheme. Without transparency -- *i.e.*, the means to detect violations -- enforcement is impossible, and without enforcement, the statutory command for open and non-discriminatory access is a nullity. A set of complaint procedures will benefit shippers in two ways: first, by providing them with a real bargaining chip in negotiations with pipelines which, in turn, should foster compliance; and second, by affording them a viable means of redress if a pipeline unlawfully discriminates or denies access.

D. Specific Reporting Issues.

We attach as Appendix B a proposed form for the submission by OCS service providers of required data for initial reports under Section 5(f)(1)(A). The form closely tracks the information required by the FERC in Order Nos. 639 and 639-A. It would present the required information in a uniform format for the benefit of both service providers and shippers.

The form has four parts:

1. General Information;
2. List of Facilities;
3. Information on Specific Facilities; and

4. Contract Information on Each Shipper for Each Set of Facilities.

The information required to be reported increases in specificity with each successive part of the report. Part Four, the most specific, requires a summary of the service providers' contracts with each shipper over each set of facilities covered by the report. For purposes of the reports, a "Service Provider" is any person or entity that operates a facility located on the OCS that is used to move crude oil or natural gas on or across the OCS.

1. Reporting should cover the transportation of both oil and natural gas.

Both oil and natural gas pipelines are covered by the OCSLA. Although the FERC's Order Nos. 639 and 639-A applied only to natural gas pipelines, oil pipelines are equally at risk for discrimination, particularly since many are not subject to regulation under the ICA, as discussed above. Transparency is necessary for effective enforcement of the statute, whether the transportation involves oil or natural gas. While the MMS may wish to phase in reporting requirements, starting with gas pipelines alone, ultimately both oil and gas service providers should be required to submit reports.

2. Reporting should include production handling services.

As discussed in Part I.C. above, the transportation of oil or gas by pipeline across the OCS, within the meaning of Section 5(f)(1)(A), includes "production handling services" downstream of the wellhead that are essential to the movement or continued movement of oil and gas to shore. Accordingly, the proposed reporting form covers the rates and material economic terms for such services in Part Four, Questions 5(f), (g) and (h).

3. Reports should include the rate and material economic terms of each transaction.

The reports elicit rate and other essential information needed to ascertain whether unlawful discrimination has occurred or is occurring. Apart from rates, material contract terms include

quality specifications that limit the oil and gas that the service provider will receive, any volumetric or capacity limitations on service, and responsibility for lateral line costs. (See Reporting Form, Part 4, Questions 5(e)-5(h).)

4. The reports should be updated quarterly.

Shippers need up-to-date information if a reporting scheme is to be effective. Once-a-year reports may contain information already superceded by more recent contracts or amendments to existing contracts. Accordingly, we propose quarterly updates to the reports, similar to what the FERC required in Order Nos. 639 and 639-A. The quarterly updates need only report new contracts or material changes to the terms of existing contracts executed during the course of the preceding calendar quarter.

A proposed form for the submission of quarterly updates is attached as Appendix C.

5. The reports should be publicly filed with MMS.

Because the value of the reports lies in their ability to promote transparency and permit shippers to monitor compliance with Section 5(f)(1)(A), the MMS should not allow them to be submitted on a confidential basis. The FERC made this mistake initially but then determined that the rate and other contract information covered by its reporting requirements did not qualify for confidential treatment under the Freedom of Information Act, particularly in light of the need for disclosure to ascertain compliance with Section 5(f)(1)(A). *Regulations Under the Outer Continental Shelf Lands Act Governing the Movement of Natural Gas and Facilities on the Outer Continental Shelf*, 96 FERC ¶ 61,296 (2001).

In denying confidential treatment, the FERC ruled that the advantages of a reporting scheme would be minimal, if any, if shippers could not obtain access to the information reported, and that service providers had failed to demonstrate that their need for confidential treatment outweighed the

benefit of being able to ensure that gas is carried on an open and nondiscriminatory basis. *Id.* at 62,097-98.

We encourage the MMS to establish an electronic library or information sharing system like that used by the FERC so that shippers may quickly retrieve the reports of OCS service providers in electronic format. Alternatively, the MMS could require service providers to post the reports in downloadable format on their websites or to make the reports available by e-mail to an electronic subscriber list.

6. Service providers should face penalties for inaccurate or incomplete reporting.

Civil and criminal penalties for inaccurate or incomplete reporting will encourage compliance with the regulations. First, the reporting form requires an officer's certification that the report has been prepared by the officer or under his/her supervision and control, and that the information contained therein is complete and accurate to the best of the officer's knowledge, information, and belief. The false certification of a report would expose the officer to criminal sanctions under 18 U.S.C. § 1001 (false statement to a governmental agency), and/or Section 24(c) of the OCSLA, 43 U.S.C. § 1350(c) (knowing and willful violation of regulation under the OCSLA, or false reporting). Second, the submission of an inaccurate or incomplete report could be grounds for the assessment of civil penalties under Section 24(b) of the OCSLA. 43 U.S.C. § 1350(b) (civil penalties for violation of OCSLA or regulation thereunder).

7. The MMS may wish to exempt NGA-regulated gas pipelines and ICA-regulated oil pipelines.

Because NGA-regulated gas pipelines and ICA-regulated oil pipelines already provide information publicly or to the FERC that would be required in a reporting scheme under Section

5(f)(1)(A), the MMS may want to consider exempting those pipelines from any redundant reporting requirements.

E. The MMS Should Create a Formal Complaint Procedure.

Complaint procedures are necessary to give shippers a means to secure redress for statutory violations. Although OCSLA § 23 permits shippers to bring claims in federal district court, many potential complainants are likely to avoid that route due to the cost and lengthy nature of federal court proceedings. On the other hand, the adjudication of claims by the MMS would be advantageous to both shippers and service providers by allowing MMS to bring its expertise to bear to assure sure-footed and uniform results in the administration of its regulations at less cost than proceedings in federal court. As noted above, the statute delegates broad powers to the MMS to carry out Congress' purpose.

Both shippers and pipelines need the precedent-setting value inherent in formal procedures to provide guidance as to what kinds of behavior constitute discrimination or a denial of open access. The MMS should make its formal decisions available to the public, and a commitment to dispose of most complaints within six to nine months of filing would inspire confidence in the complaint procedures. In addition, the formal complaint procedures could be supplemented with a hotline and informal dispute resolution procedures, such as mediation or arbitration.

The FERC's complaint procedures set forth in Rule 206 of the FERC's Rules of Practice and Procedure, 18 C.F.R. § 385.206, provide a useful model. We have attached as Appendix D a copy of Rule 206 of the FERC's Rules of Practice and Procedure. We also have included FERC discovery Rules 401-411, and Rules 213 and 214 governing the respondent's answer and intervention by interested parties. We believe that adoption of similar rules is necessary to adapt the general rules of practice and procedure used by the Department of the Interior, which typically deal

with claims by the Department against private parties, or vice versa, to the adjudication of cases between private parties.

Complaints that cannot be resolved on summary disposition -- *i.e.*, that involve disputed issues of material fact -- should be set for evidentiary hearing before an Administrative Law Judge, with appropriate discovery procedures. We believe that the MMS should consider using the Office of Hearings and Appeals ("OHA") at the Department of Interior to handle adjudications involving disputed issues of material fact. The MMS would thereby achieve some separation of functions, as well as make use of the already existing cadre of Administrative Law Judges within the Department.

III. ANSWERS TO SPECIFIC QUESTIONS

We provide below answers to questions that were raised in the Advance NOPR or at the public workshops on April 27, May 11 and May 14, 2004.

Question No. 1: How widespread is discrimination and denial of access on OCS pipelines?

Response. As noted above, the absence of reporting requirements and the insistence by service providers on placing confidentiality clauses in their contracts make it virtually impossible to gauge with any accuracy the incidence of discrimination and denial of access. Nevertheless, we are aware of some instances of both discrimination and denial of access and have no reason to believe that such incidents are isolated. For example, in the aftermath of Transco's spin-down of its NPI facilities to WGP, the FERC ruled that WGP set rates so high as to deny reasonable economic access.[19]

[19] *Shell Offshore Inc. v. Transcontinental Gas Pipe Line Corp. et al.*, 103 FERC ¶ 61,177 (2003), *review pending, Williams Gas Processing et al. v. FERC*, No. 03-1179, (D.C. Cir., filed June 27, 2003).

We are also aware of another case involving a rate increase for shipments of oil on Shell Pipeline's Central Gulf Gathering System ("CGGS"). Prior to the rate increase in December 2003, rates on the CGGS had been in the range of $0.53 to $1.45 per barrel, averaging about $0.68 a barrel. Throughput on the system had declined, reflecting the general decline in oil production in the area. Shell Pipeline exempted the five most productive platforms on the system from the rate increase and then allocated its remaining revenue requirement equally over the remaining 38 platforms -- not the remaining production. The result was a set of rates that ranged from $0.53 a barrel to over $5.20 a barrel for the low-producing platforms. Some producers' rates increased by more than 600%.

A group of producers, including many Producer Coalition members, protested the rate increase under Section 5(f)(1)(A). Discussions with Shell Pipeline thereafter led to a settlement whereby Shell Pipeline agreed to implement tiered volumetric maximum rates for a period of three years, with an annual adjustment based on changes in throughput. The maximum rates beginning May 1, 2004 range from $0.65 a barrel for platforms producing greater than 8,000 barrels a day to $1.34 per barrel for platforms producing 500 barrels a day or less.

Public price reporting and vigilant enforcement by the MMS would reduce the risk of rate increases like those proposed by WGP in late 2001 and by Shell Pipeline in December 2003.

Question No. 2: What actions could the MMS take to prevent denial of open access to OCS pipeline facilities?

Response. The shipper will generally have a good idea that something is wrong at the time the denial of access occurs. In contrast, the detection of discrimination generally requires knowledge of the terms and conditions of service offered to other shippers on the affected facilities. MMS could help avoid denial of access to offshore pipelines by making available to shippers

complaint procedures, as well as possibly a hotline to handle efficiently potential complaints at the outset.

In the case of denial of physical access to facilities, the MMS should be prepared to order physical connections or other appropriate relief. In the case of a denial of reasonable economic access, the MMS should be prepared to order the flow of gas or oil on reasonable economic terms, which in some situations may require that MMS establish specific rates that will afford reasonable economic access.

Question No. 3: If the MMS were to establish a hotline, what kinds of complaints could it expect to receive through the hotline?

Response. The complaints received through a hotline likely would include claims of denial of access, both in terms of physical access and access on reasonable economic terms, as well as claims of discrimination. While a hotline procedure could be helpful in resolving all kinds of claims, it might be the most useful with respect to discrimination claims by allowing shippers to learn from service providers, through the auspices of the hotline, the reasons for the differences in rates. (While the reports filed by a service provider might show differences in rates, they would not necessarily explain why those differences exist.) The shipper's understanding of the rationale behind the different treatment might end matters, or might clarify the justification for pursuing formal complaint.

Question No. 4: Can the MMS administer the pipeline provisions of the OCSLA without bias, including adjudicating claims of denial of access or discrimination by a pipeline, in light of MMS' responsibility to maximize the collection of royalties from oil and gas production and its role as a commercial shipper of oil and gas on OCS pipelines under the royalty-in-kind program?

Response: Yes.

Due process requires a "fair trial in a fair tribunal" in both Article III courts and in administrative agencies that perform adjudicative functions. *Withrow v. Larkin*, 421 U.S. 35, 46

(1975). The Supreme Court has identified various situations in which "experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.* at 47. Examples include "those [cases] in which the adjudicator has a pecuniary interest in the outcome." *Id.*

Such personal pecuniary interest, however, goes to the qualifications of the decisionmaker individually, not to the institutional qualifications of an agency, court or other governmental body. The only case in which the Supreme Court has held that institutional pecuniary interests alone rendered the adjudicator unconstitutionally biased is *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). There the mayor of a village had responsibility for the village's finances and also was the presiding judge of the mayor's court, which imposed and collected fines, forfeitures, costs, and fees, all of which constituted a substantial portion of the village's revenue. *Id.* at 58. The Court held that these conflicting responsibilities rendered the mayor unconstitutionally biased. *Id.* at 61. The Court said that the relevant inquiry was whether the situation "would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused." *Id.* at 60.

The *Ward* Court distinguished its earlier decision in *Dugan v. Ohio*, 277 U.S. 61 (1928), in which the Court had found that a mayor's judicial functions were not constitutionally impermissible where a commission of five members, including the mayor, exercised all legislative powers, and a city manager shared the executive powers with the commission. In that situation, the Court recognized "that the Mayor's relationship to the finances and financial policy of the city was too remote to warrant a presumption of bias toward conviction in prosecutions before him as judge." *Id.*

at 61–62. In *Ward*, by contrast, a single individual decisionmaker occupied "two practically and seriously inconsistent positions, one partisan and the other judicial." *Ward*, 409 U.S. at 60.

The MMS' responsibility to maximize royalties does not create the kind of conflicting responsibilities found in *Ward*. For one thing, the revenue from royalties goes not to the MMS but into the general funds of the U.S. Treasury.[20] For another, royalties from oil and gas production constitute less than 1% of total federal revenue each year. And finally, but no less important to the constitutional analysis, the MMS' adjudicatory and commercial authority does not reside in a single individual. The MMS has established a separate branch (Minerals Revenue Management) to administer royalty collection and the RIK Program. The division of responsibility within the agency mitigates possible conflict at the Director level, where decisions on complaints most likely would be made. To assure that adjudicatory and commercial functions remain separate, the MMS could establish a "Chinese wall" within the agency that would exclude the Associate Director and Staff of the Minerals Revenue Management from playing any role in the adjudication of complaints under Section 5(f)(1)(A). The Minerals Revenue Management would be free to participate in complaint proceedings as a complainant or intervenor, like any other shipper.

Doolin Sec. Sav. Bank, F.S.B. v. FDIC, 53 F.3d 1395 (4th Cir. 1995), strongly supports our conclusion. There the court rejected the argument that the FDIC's institutional pecuniary interest in the outcome of the proceedings violated due process. The court distinguished situations where an individual decisionmaker stands to gain substantial, personal pecuniary benefits from those where there is only a general institutional interest in the outcome:

> Doolin does not isolate certain decisionmakers and indicate reasons why those particular adjudicators are biased. Doolin rather alleges that the entire decisionmaking apparatus of the FDIC is biased because Congress has required the FDIC to consider the needs of the insurance fund in determining assessments. This

[20] See 43 U.S.C. § 1338 (providing that all rentals, royalties, and other sums paid under a lease on the OCS shall be deposited into the U.S. Treasury).

> general allegation implies an institutional bias much less influential than the institutional 'temptation' in Ward, in which the mayor's executive function substantially benefited from the fines he imposed in his adjudicative function . . . . The FDIC's interest in maintaining the fund appears no greater than the interests of many agencies that adjudicate penalty or fee determinations in their own administrative proceedings. Presumably all agencies inherently have some level of 'institutional bias,' but such an interest does not render all agencies incapable of adjudicating disputes within their own proceedings given the strong public interest in effective, efficient, and expert decisionmaking in the administrative setting. Thus, we decline to abrogate the presumption of honesty and integrity of administrators who serve as adjudicators . . . .

53 F.3d at 1407. The court noted that a finding of bias based on the institutional interest of the agency "would seriously undermine the ability of agencies in general to adjudicate disputes that affect their official policies." *Id.*

Similarly, in *Hammond v. Offutt*, 866 F.2d 172 (6th Cir. 1989), the Sixth Circuit held, in the absence of specific allegations of individual bias, that a claim of general institutional bias does not suffice to establish a constitutional violation. The Court noted that there are two types of cases in which bias has been found to exist: "either the decisionmakers derived a direct, pecuniary interest from decisions adverse to claimants; or the decisionmaker was engaged in both adjudicative and executive functions in violation of the principle of separation of powers." 866 F.2d at 177 (citations omitted).

A general institutional pecuniary interest does not render an agency biased for due process purposes. Thus, MMS's responsibility for maximizing the collection of royalties from oil and gas production on the OCS and for shipping oil and gas under the RIK program does not disqualify it from administering the pipeline regulations and adjudicating cases thereunder.

Question No. 5: Would the publication of information already collected by the MMS on movement of oil and gas across OCS pipelines be sufficient to provide an effective reporting program?

Response. The publication of information from Form 2014 reports filed with MMS would not be an effective substitute for the proposed reporting requirements, as such information is not sufficiently complete and is not formatted in a way that lends itself to easy use by shippers.

Question No. 6: Do Sections 5(e) and 5(f)(1)(A) impose a "common carrier" obligation on oil and gas pipelines located on the OCS to prorate capacity in the event of shortage?

Response. No. Although Sections 5(e) and 5(f)(1)(A) both prohibit discrimination, they do not impose a common carrier obligation, which would require the pipeline to allocate capacity on a pro rata basis in the event capacity is insufficient to handle all oil or gas tendered for transport. Nowhere does the OCSLA or its legislative history state that a common carrier obligation to pro rate capacity is imposed on OCS pipelines. Rather, if there is a shortage of capacity, Section 5(e) requires the FERC, in consultation with the Secretary of Energy, to determine the reasonable proportional amounts to be allocated to each shipper, "taking into account, among other things, conservation and the prevention of waste." 43 U.S.C. § 1334(e).

The allocation scheme envisioned by Section 5(e) is distinctly different from common carrier prorationing. In giving weight to "conservation and prevention of waste," Section 5(e) suggests that existing production may have priority over new production in getting access to constrained capacity. Congress' determination to allocate capacity in this fashion, rather than under a common carriage scheme, is consistent with the widespread practice of producers to give priority to their own production at platform treating facilities. Access to such facilities is provided to third parties to the extent excess capacity is available. In the event of shortage of OCS pipeline capacity, a service provider's existing method of allocating capacity would continue unless and until the FERC

determines that constrained capacity should be allocated differently based on the facts of the particular case after a Section 5(e) hearing.

Section 5(f) addresses the circumstances under which a pipeline may be required to expand capacity to accommodate new shippers. However, this provision does not apply to pipelines in the Gulf of Mexico. 43 U.S.C. § 1334(f)(1)(B).

Question No. 7: Is there a level of pricing for OCS pipeline services, short of the level at which a producer would be required to shut in its production, that can nevertheless constitute denial of reasonable economic access to pipeline facilities?

Response: Yes. A finding of denial of reasonable economic access does not require a price level so high as to force a producer to shut-in its production, but may be triggered at a lower level depending on the circumstances in a particular case.

The only case finding denial of reasonable economic access under OCSLA § 5(f)(1)(A) is the *Shell Offshore* complaint case. *See* 103 FERC ¶ 61,177 at par. 38. In that case, although Shell Offshore shut in its gas production in the face of WGP's price increase for service over the recently spun-down NPI facilities, the FERC did not find that the price level alone caused Shell to take such action. Rather, the record showed that Shell Offshore shut in its production because WGP gave it no meaningful choice: Shell Offshore could either accept WGP's price increase -- an unacceptable option -- or shut in its production. Shell Offshore chose to shut in its production.

The FERC established a cost-based rate of $0.0169 per Dth as the proxy for a competitive rate for service over the NPI facilities as a remedy for denial of reasonable economic access. 103 FERC ¶ 61,177 at par. 41. In contrast, the initial rate that WGP sought from Shell was $0.12 per Dth.

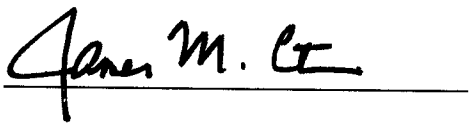
Several factors can affect whether a rate is so high as to deny reasonable economic access. These include principally the relative costs of operating pipeline facilities and the throughput that

can be expected across such facilities. A service provider might be able to justify a fairly significant rate if costs have increased significantly and/or throughput has declined. These variables need to be assessed in determining whether the service provider's rate is at a level that denies reasonable economic access.

CONCLUSION

To implement Section 5(f)(1)(A), the MMS should adopt a scheme of light-handed regulation consisting of reporting requirements and complaint procedures as proposed herein.

Respectfully submitted,



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June 14, 2004

APPENDIX A

ORIGINAL

United States Department of the Interior

MINERALS MANAGEMENT SERVICE
Washington, DC 20240

August 26, 1999

Office of the Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: Regulations under the Outer Continental Shelf (OCS) Lands Act Governing the Movement of Natural Gas on Facilities on the Outer Continental Shelf; Notice of Proposed Rulemaking; Docket No. RM99-5-000

Gentlemen:

As the Federal agency responsible for management of the Nation's natural gas resources on the Federal OCS, the Mineral Management Service appreciates the opportunity to comment on the above proposed rulemaking. Any changes the Federal Energy Regulatory Commission may consider based upon its review of the comments filed in the above-referenced matter could impact MMS's current policies and procedures and planned changes to our program.

MMS offers the following in response to Docket No. RM99-5-000.

MMS concurs with the premise of the proposed rule. The minimum needed to enforce the OCSLA requirement of open and non-discriminatory access to pipelines transporting natural gas from the OCS is information on the rates charged to both affiliated and non-affiliated shippers. MMS agrees that the Commission has jurisdiction under the OCSLA even for pipelines for which it has no jurisdiction under the NGPA or NGA to require open access and non-discrimination. MMS believes that the approach taken by the Commission is a sensible minimal approach to assuring open access and nondiscrimination. MMS does not believe that the minimal information collection required of NGPA or NGA non-jurisdictional pipelines is too great in the context of encouraging full and open competition in the development, utilization and marketing of gas produced from the OCS. MMS believes that by having information in advance of making investments in new OCS production and transportation facilities or in advance of marketing decisions, producers and marketers of OCS production will be able to make more timely decisions. This in turn will help to meet the goal of OCSLA to make the OCS "available for expeditious and orderly development . . . in a manner consistent with the maintenance of competition and other national needs."

However, MMS does have some concerns regarding the details of the proposed regulation and offers the comments that follow.

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The MMS and FERC have different definitions of the same term – gathering. The MMS differentiates between the terms gathering and transportation. The purpose for this differentiation is that the costs of transportation are deductible from royalties whereas the costs of gathering are not. Lines characterized as gathering lines by FERC may be eligible for a transportation allowance under the MMS royalty gas valuation regulations.

Additionally, with the continuing development of the Gulf of Mexico OCS, with discoveries occurring in deeper water, and with more frequent use of new technologies, MMS, like FERC, recognizes the need for consistent and understandable guidelines. MMS believes that if the Commission is requiring the filing of all transportation rates in use for all gas pipelines on the OCS, then MMS will not be required to demand the same information from producers which are its lessees. To meet this goal, it will be necessary for the Commission and the MMS to use the same definitions, as we will explain in more detail below.

The MMS supports the FERC's new light-handed regulatory approach but believes that new proposed reporting requirements must apply to all pipelines in order to achieve open and non-discriminatory access. Requiring data to be reported for all pipelines could also benefit the MMS in verifying transportation deductions claimed under our current in-value regulations.

The FERC specifically asked for comments concerning certain circumstances under which the proposed regulations would not apply. The MMS (Department of the Interior) is a royalty interest owner in every OCS lease. As such, the MMS has the option of taking its royalty share in-kind or in-value. The MMS is currently conducting pilot projects to test methods for taking its royalty gas in-kind. The MMS will surely find itself seeking transportation on lines that would be excluded from the reporting requirements of the proposed regulations. MMS believes that its ability to choose to take gas as royalty-in-kind, under 43 U.S.C. 1353, Section 27 of the OCSLA, would be adversely affected if there were any pipelines through which the owner could discriminate against it or purchasers of its gas. For example, if the owner of a pipeline were to ship only its gas through that line, it could charge MMS or its purchasers any discriminatory rate, thus making MMS's choice to take its royalty-in-kind non-competitive. MMS does not believe that it is efficient to wait until we make a decision to take royalty-in-kind, and then attempt to ship gas through the pipeline for the pipeline owner to be required to post the "fees" it charges itself or its sole customer. That could lead to a long period before the rates were known and perhaps a longer period until they were required to be non-discriminatory. The United States would not be able to recover the full market value of the gas during whatever period the discriminatory rates were being charged. Therefore, MMS believes section 330.3 is unwarranted and should be eliminated when the regulation is published as a final rulemaking.

The information that the Commission is requesting would be beneficial to the MMS in assuring that reasonable rates are being charged for transportation, particularly in those instances where there are no alternative routes. The MMS offshore gas-in-kind team has identified several instances where shippers are being treated inequitably because of lack of access and discriminatory rates. The MMS requests that a final regulation specifically apply the reporting

requirements whenever the Federal Government's royalty gas could be moved along with only one other producer's gas.

Generally, MMS does not believe that the filing by a Gas Service Provider (provider) of its contracts (Section 330.2(b)(1)) or "rules, regulations, and conditions of service" (Section 330.2(b)(2)) will necessarily give a complete picture of the circumstances under which gas is shipped through the provider's pipeline. MMS's specific concern is that a provider who is the only shipper (for example, through a lateral line from its platform to a main line pipeline) will have no contracts or written rules, regulations, and conditions of service to file. Indeed there may be many circumstances where no charge is made to shipments made by the provider or its affiliate. MMS would prefer that an additional requirement be made that the provider file a complete description of its costs, whenever that is the charge incurred by the provider or any affiliate that ships gas through the pipeline. If the Commission agrees, at least for pipelines with no contracts or written rules, etc., between the Gas Service Provider and itself or its affiliated producer, the rule should require the filing of a description of costs. MMS suggests that the most appropriate description of costs would be the costs MMS allows to be deducted as transportation expenses pursuant to the regulations at 30 C.F.R. section 206.157.

MMS believes that by adopting the MMS standard, the FERC will allow OCS lessees, and their affiliated providers, to maintain only one set of books of their OCS transportation costs and charges for all Federal regulatory purposes. This would indeed help to meet the goal of having this rule be a uniformly applied, light-handed regulatory standard equally applicable to all OCS gas service providers.

The MMS welcomes the opportunity to meet and discuss these and other issues that mutually affect the equitable treatment of the Federal share of oil and gas production from the OCS lands of the United States.

Sincerely,

Walter D. Cruickshank,
Associate Director, Policy and
Management Improvement

APPENDIX B

REPORTING FORM FOR OCS SERVICE PROVIDERS
INITIAL REPORT
(MM/DD/YY)

General Instructions: For purposes of this report, a "Service Provider" is any person or entity that operates a facility located on the OCS that is used to move crude oil or natural gas on or across the OCS. Each Service Provider required to submit reports under MMS Regulation [_____] should complete this form. The form contains five parts, which are designed to elicit the following types of information: (1) general information about the Service Provider; (2) a list of the Service Provider's facilities where services related to the movement of oil or gas across the OCS are performed; (3) specific physical information about the Service Provider's facilities and a listing of shippers that receive services on each such facility; and (4) price and material contract terms for each of the Service Provider's contracts, broken down by shipper and facility. The fifth part requires an executive officer of the Service Provider to certify that the contents of the report are true and complete to the best of such officer's knowledge, information and belief. The date of the report should be filled in on each page

PART ONE -- GENERAL INFORMATION

1. Full legal name and address of Service Provider:

2. Name, address and telephone number of contact person for Service Provider:

3. Title, name and address of Service Provider's officers, if a corporation, or of its general partners, if a partnership:

4. List of all entities (identified by state of incorporation if a corporation, or state of organization if a partnership or business trust) that directly or indirectly control the Service Provider (designating any such entities that are publicly-traded and identifying the exchange where traded):

For purposes of these reports, "control" (including the terms "controlling," "controlled by," and "under common control with") includes, but is not limited to, the possession, directly or indirectly, and whether acting alone or in conjunction with others, of the authority to direct or cause the direction of the management policies of a company. A voting interest of 10% or more creates a rebuttable presumption of control.

REPORTING FORM FOR OCS SERVICE PROVIDERS

Initial Report
(MM/DD/YY)

PART TWO -- LIST OF FACILITIES

Instructions: List all facilities where the Service Provider provides services related to the movement of oil or gas across the OCS. List each facility separately, assigning each a sequential Exhibit number. For example, in the case of a Service Provider that owns two sets of facilities, one in the South Marsh Island area and the second in the Eugene Island area, the Service Provider could list the facilities as Exhibit 1, South Marsh Island Gathering System, and Exhibit 2, Eugene Island Block 217 Platform Treating Facilities.

In the third column, designate the hydrocarbons handled by the facilities. Use the following abbreviations: "O" for crude oil; "G" for natural gas; and "C" for condensate.

Exhibit No.	Facility Name/Identification	Product

REPORTING FORM FOR OCS SERVICE PROVIDERS

Initial Report
(MM/DD/YY)

PART THREE -- INFORMATION ON SPECIFIC FACILITIES

EXHIBIT ___

_____ Facilities

(For each facility identified in Part Two, submit a separately numbered Exhibit under Part Three, bearing a number that corresponds to the Exhibit number shown in Part Two and identifying the facility as listed in Part Two.)

A. Description of facilities:

Include a detailed description of facilities, including a physical description of facilities, the location of such facilities (by OCS block(s)), the length and size of the facilities, the platform locations at which services are rendered, the shoreward terminus of such facilities, and the boundaries of any rate zones or rate areas related to such facilities.

(Map of facilities: Attached as Exhibit ___-A.)

The map of facilities should be presented on an 8 ½ x 11 inch or larger paper and should show OCS block locations. The map should bear the same number as the Exhibit, with the suffix "-A" added. For example, the map for the Exhibit 1 facilities would be designated Exhibit 1-A.

B. List of shippers:

Provide a numbered listing of the shippers that receive service across or through each facility listed in part A above.

1.
2.
3.

REPORTING FORM FOR OCS SERVICE PROVIDERS

Initial Report
(MM/DD/YY)

PART FOUR -- CONTRACT INFORMATION ON EACH SHIPPER

EXHIBIT ___ SHIPPERS

Instructions: Provide a summary of the key terms of each contract between a shipper and the Service Provider for services using each facility listed as an Exhibit in Part Three. Service Providers need not submit a separate form for each contract, but are encouraged to consolidate information to the extent possible for particular facilities using columned grids, spreadsheet formats or other consolidation of responses to minimize repetition of contract information.

1. Shipper No. ___; full name of shipper:

Shipper No. refers to the number assigned to the shipper in Part Three, subpart B.

2. Shipper's contract no. _____.

List the internal tracking number or code the Service Provider has assigned to the particular contract of the shipper.

3. Term of contract:_____.

Provide either the starting and end date for services or the term of the contract and the end date. For example, the contract term could be listed as "from April 1, 2004 through March 31, 2007," or as "3 years, ending March 31, 2007."

4. Is shipper an affiliate of Service Provider?_____.

Answer "yes" or "no." For purposes of these reports, an "affiliate" is an entity that controls, is controlled by, or is under common control with, the Service Provider.

5. Description of service(s):

(a) Type of service(s) provided:

Give a general description of the service. For example, the service could be "gathering service," "production handling services," and/or "transmission service."

(b) State whether service is firm or interruptible.

Firm service is generally understood to be service that can be interrupted only in the event of force majeure, while interruptible service may be interrupted more frequently.

(c) Primary receipt point(s):

Describe the location (by OCS block and designation of interconnecting upstream facilities) of the points where the service provider first receives oil or natural gas on behalf of the shipper.

(d) Primary delivery point(s):

List the locations (by OCS block and designation of receiving interconnected facilities) where the Service Provider delivers the oil or natural gas received from shipper.

(e) Rates and charges for gathering or transmission services between each pair of primary receipt and delivery points and each pair of other points served:

Include rates for service between primary receipt and delivery points designated in the contract, as well as rates for service between any other points (not specifically designated as "primary" points in the contract), if applicable. Include any and all monetary fees imposed for services, whether characterized as a rate, fee, charge, surcharge, etc.

(f) Rates and charges for production handling services:

List the rates for any production handling services, specifying the type of production handling service performed. For any services that are not listed in Items (i) – (iv) below, describe the service under Item (v) below and list the rate for such other services.

(i) Oil handling:

(ii) Gas handling:

(iii) Compression:

(iv) Water disposal:

(v) Other services/charges:

(g) Quality specifications or other limitations on the receipt or handling of oil or natural gas by Service Provider:

Provide information on any restrictions that limit a shipper's ability to deliver oil or natural gas to the custody of Service Provider. Examples of such restrictions might be a sulphur content limitation for crude oil, or hydrocarbon dewpoint ("HDP") limit for natural gas.

(h) Other material economic terms deemed relevant by Service Provider:

Provide information on any other terms the Service Provider considers significant in its contract with the shipper. Examples of such terms might be a provision for reimbursement of facilities costs for a subsea tap to effect an interconnection with the Service Provider's facilities.

(i) State whether Service Provider has waived (in whole or in part) any of the terms identified in Questions 5(a) through 5(g) above. Identify specific terms that have been waived and any substitute terms in effect as a result of the waiver.

REPORTING FORM FOR OCS SERVICE PROVIDERS
Initial Report
(MM/DD/YY)

PART FIVE – OFFICER'S CERTIFICATION

Officer's Certification:

_____(Name)_____, _____(title)_____ **of**
_____(firm name)_____ **certifies that this report and all constituent parts, appendices and exhibits submitted herewith ("Report") have been prepared by (him/her) or under (his/her) supervision and control; that the Report is being submitted to the Minerals Management Service in fulfillment of 30 C.F.R. §** _____**; and that the information contained in the Report is complete and accurate to the best of (his/her) knowledge, information and belief.**

_____

Signature **Location** **Date**

APPENDIX C

REPORTING FORM FOR OCS SERVICE PROVIDERS SUPPLEMENTAL REPORT (MM/DD/YY)

INSTRUCTIONS FOR SUPPLEMENTAL REPORTING FORM

General Instructions: The Supplemental Reporting Form should be filed each quarter to update changes to existing contracts and to note deletions of pre-existing contracts and additions of new contracts. The Supplemental Reporting Form contains six parts: (1) Summary Report; (2) Part 1 Supplement ("S") - General Information; (3) Part 2S - List of Facilities; (4) Part 3S - Information on Specific Facilities; (5) Part 4S - Contract information for each shipper for each facility; and (6) Part 5S - Officer's Certification. The Supplemental Reporting Form parallels the general format of the Initial Report, for example, with Part 1S corresponding to Part 1 of the Initial Reporting Form, and so forth. Provide information only to the extent there has been a change during the immediately preceding calendar quarter (hereinafter, "reporting period"). Where no information is submitted, the omission is deemed to reflect a response of "No Change."

SUMMARY

1. Name of Service Provider:

2. Summary of changes in organization, facilities and terms of service during the reporting period. (List changes numerically and indicate in parentheses the applicable Part of the Supplemental Report being submitted herewith that contains detail on each change).

List and describe briefly all changes that have occurred during the reporting period, including changes from Initial Reports and previously submitted Supplemental Reports, cross referencing the section of the Supplemental Reporting Form where the change is discussed. For example, a Summary for one Service Provider ("Sample Service Provider") might read as follows:

1. *Change of corporate name to ABC Pipeline Company. (See Part 1S.)*
2. *Initiated services on South Marsh Island Gathering System. (See Part 2S through 4S)*
3. *Changed rates for Eugene Island Block 217 platform treating facilities. (See Part 4S.)*

SUPPLEMENTAL REPORT
FOR OCS SERVICE PROVIDERS
(MM/DD/YY)

PART 1S -- GENERAL INFORMATION

1. **Full legal name and address of Service Provider:**

   The Sample Service Provider (see Summary) would provide details of the corporation's name change to ABC Pipeline Company.

2. **Name, address and telephone number of contact person for Service Provider:**

3. **Title, name and address of Service Provider's officers, if a corporation, or of its general partners, if a partnership:**

4. **List of all entities (identified by state of incorporation if a corporation, or state of organization if a partnership or business trust) that directly or indirectly control the Service Provider (designating any such entities that are publicly-traded and identifying the exchange where traded):**

SUPPLEMENTAL REPORT
FOR OCS SERVICE PROVIDERS
(MM/DD/YY)

PART 2S -- LIST OF FACILITIES

Describe any new facility systems the Service Provider has acquired or placed in service during the reporting period, assigning to each such facility an Exhibit Number. Also describe any facilities that have been abandoned or sold, listing the previously assigned Exhibit Number associated with such facilities. If the change in facilities affects only discrete segments or portions of facilities that were added to or removed from an existing facility system that has already been reported and assigned an Exhibit Number, the Service Provider should file this information under the Part Three Supplemental Report, which deals with the description and map of specific facilities. For example, the Sample Service Provider (see Summary)would reflect the addition of the South Marsh Island Gathering System, as follows:

Added Facilities

Exhibit No.	*Description*	*Product*
6	*South Marsh Island Gathering System*	*G, C*

Added Facilities

Exhibit No.	Description	Product

Deleted Facilities

Exhibit No.	Description	Product

SUPPLEMENTAL REPORT
FOR OCS SERVICE PROVIDERS
(MM/DD/YY)

PART 3S -- INFORMATION ON SPECIFIC FACILITIES

Describe any changes in the reporting period relating to the physical description of any existing facilities and the shippers using each such facility. For example, if a Service Provider has abandoned or sold a portion of its facilities within a particular system, appropriate changes should be included in the description of facilities, in an updated map of the facilities, and in the list of shippers by deleting shippers who have been eliminated as result of the change in facilities.

EXHIBIT ___

_____ Facilities

1. Description of facilities:

Include a detailed description of facilities, including a physical description of facilities, the location of such facilities (by OCS block(s)), the length and size of the facilities, the platform locations at which services are rendered, the shoreward terminus of such facilities, and the boundaries of any rate zones or rate areas related to such facilities.

2. Map of facilities: Attached as Exhibit ___-A.

The map of facilities should be presented on an 8 ½ x 11 inch or larger paper and should show OCS block locations. The map should bear the same number as the Exhibit, with the suffix "-A" added. For example, the map for the Exhibit 1 facilities would be designated Exhibit 1-A.

3. List of shippers:

Provide a numbered listing of the shippers that receive service across or through the facility listed in part A above.

1.
2.
3.

SUPPLEMENTAL REPORT FOR OCS SERVICE PROVIDERS

Supplemental Report MM/DD/YY

PART 4S -- CONTRACT INFORMATION ON EACH SHIPPER

List any changes effected in contract terms for particular shippers during the course of the reporting period. Like Part Four of the Initial Report, the Supplement carries a designated Exhibit Number to show the particular facilities system where changes in contract terms and conditions have been made. The Service Provider may report the changes in rates and terms of service on either a consolidated basis, provided that the changes are uniform among the affected shippers, or on a shipper-by-shipper basis. Service Providers are encouraged to consolidate as much information as reasonably possible to minimize the reporting burden.

EXHIBIT ___ SHIPPERS

[Description of Facility]

A. Consolidated Reporting Option

Where multiple contracts contain the same changes to terms of service, the Service Provider may file only one Part 4S. List the affected shippers by shipper no., name, and contract no., and describe the nature of the change in rates, charges or terms of service, showing in parentheses the effective date of each change. If desired, the Service Provider may present such information in a grid form. For example, the Sample Service Provider (see Summary) might list the following:

Exhibit 5 Shippers (Eugene Island Block 217 Platform Treating Facilities)

Shipper No./Name	*Contract No.*	*Description of change in contract terms*
All shippers	*All contracts*	*Changed gas handling charge in all contracts to 10.0 cents per Mcf. (Effective 6/1/04)*

B. Contract-by-Contract Reporting Option

Where different changes have been made to different contracts for service over a particular facility, submit a separate Part 4S for each affected contract. List the affected contracts by shipper no., shipper name and contract no., and describe the changes to rates, charges or terms of service, including the effective date of such changes, for each contract.

PART 5S – OFFICER'S CERTIFICATION

Officer's Certification:

(Name), (title) of (firm name) certifies that this report and all constituent parts, appendices and exhibits submitted herewith ("Report") have been prepared by (him/her) or under (his/her) supervision and control; that the Report is being submitted to the Minerals Management Service in fulfillment of 30 C.F.R. § _____; and that the information contained in the Report is complete and accurate to the best of (his/her) knowledge, information and belief.

Signature	Location	Date

Federal Energy Regulatory Commission
18 C.F.R. 385
Selected Rules of Practice and Procedure

COMPLAINTS (Rule 206)

(a) General rule. Any person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction.

(b) Contents. A complaint must:

(1) Clearly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements;

(2) Explain how the action or inaction violates applicable statutory standards or regulatory requirements;

(3) Set forth the business, commercial, economic or other issues presented by the action or inaction as such relate to or affect the complainant;

(4) Make a good faith effort to quantify the financial impact or burden (if any) created for the complainant as a result of the action or inaction;

(5) Indicate the practical, operational, or other nonfinancial impacts imposed as a result of the action or inaction, including, where applicable, the environmental, safety or reliability impacts of the action or inaction;

(6) State whether the issues presented are pending in an existing Commission proceeding or a proceeding in any other forum in which the complainant is a party, and if so, provide an explanation why timely resolution cannot be achieved in that forum;

(7) State the specific relief or remedy requested, including any request for stay or extension of time, and the basis for that relief;

(8) Include all documents that support the facts in the complaint in possession of, or otherwise attainable by, the complainant, including, but not limited to, contracts and affidavits;

(9) State

(i) Whether the Enforcement Hotline, Dispute Resolution Service, tariff-based dispute resolution mechanisms, or other informal dispute resolution procedures were used, or why these procedures were not used;

(ii) Whether the complainant believes that alternative dispute resolution (ADR) under the Commission's supervision could successfully resolve the complaint;

(iii) What types of ADR procedures could be used; and

(iv) Any process that has been agreed on for resolving the complaint.

(10) Include a form of notice suitable for publication in the Federal Register and submit a copy of the notice on a separate 3\1/2\inch diskette in ASCII format;

(11) Explain with respect to requests for Fast Track processing pursuant to section 385.206(h), why the standard processes will not be adequate for expeditiously resolving the complaint.

(c) Service. Any person filing a complaint must serve a copy of the complaint on the respondent, affected regulatory agencies, and others the complainant reasonably

knows may be expected to be affected by the complaint. Service must be simultaneous with filing at the Commission for respondents. Simultaneous or overnight service is permissible for other affected entities. Simultaneous service can be accomplished by electronic mail in accordance with Sec. 385.2010(f)(3), facsimile, express delivery, or messenger.

(d) Notice. Public notice of the complaint will be issued by the Commission.

(e) Privileged treatment.

(1) If a complainant seeks privileged treatment for any documents submitted with the complaint, the complainant must submit, with its complaint, a request for privileged
treatment of documents and information under section 388.112 of this chapter and a proposed form of protective agreement. In the event the complainant requests privileged treatment under section 388.112 of this chapter, it must file the original and three copies of its complaint with the information for which privileged treatment is sought and 11
copies of the pleading without the information for which privileged treatment is sought. The original and three copies must be clearly identified as containing information for which privileged treatment is sought.

(2) A complainant must provide a copy of its complaint without the privileged information and its proposed form of protective agreement to each entity that is to be served pursuant to section 385.206(c).

(3) The respondent and any interested person who has filed a motion
to intervene in the complaint proceeding may make a written request to the complainant for a copy of the complete complaint. The request must include an executed copy of the protective agreement and, for persons other than the respondent, a copy of the motion to intervene. Any person may file an objection to the proposed form of protective agreement.

4) A complainant must provide a copy of the complete complaint to the requesting person within 5 days after receipt of the written request that is accompanied by an executed copy of the protective agreement.

f) Answers, interventions and comments. Unless otherwise ordered by the Commission, answers, interventions, and comments to a complaint must be filed within 20 days after the complaint is filed. In cases where the complainant requests privileged treatment for information in its complaint, answers, interventions, and comments are due within 30 days after the complaint is filed. In the event there is an objection to the protective agreement, the Commission will establish when answers will be due.

(g) Complaint resolution paths. One of the following procedures may be used to resolve complaints:

(1) The Commission may assign a case to be resolved through alternative dispute resolution procedures in accordance with Secs. 385.604-385.606, in cases where the affected parties consent, or the Commission may order the appointment of a settlement judge in accordance with Sec. 385.603;

(2) The Commission may issue an order on the merits based upon the pleadings;

(3) The Commission may establish a hearing before an ALJ;

(h) Fast Track processing.

(1) The Commission may resolve complaints using Fast Track procedures if the complaint requires expeditious resolution. Fast Track procedures may include expedited action on the pleadings by the Commission, expedited hearing before an ALJ, or expedited action on requests for stay, extension of time, or other relief by the Commission or an ALJ.

(2) A complainant may request Fast Track processing of a complaint by including such a request in its complaint, captioning the complaint
in bold type face ``COMPLAINT REQUESTING FAST TRACK PROCESSING,"
and
explaining why expedition is necessary as required by section 385.206(b)(11).
(3) Based on an assessment of the need for expedition, the period for filing answers, interventions and comments to a complaint requesting Fast Track processing may be shortened by the Commission from the time provided in section 385.206(f).
(4) After the answer is filed, the Commission will issue promptly an order specifying the procedure and any schedule to be followed.

(i) Simplified procedure for small controversies. A simplified procedure for complaints involving small controversies is found in section 385.218 of this subpart.

(j) Satisfaction.

(1) If the respondent to a complaint satisfies such complaint, in whole or in part, either before or after an answer is filed, the complainant and the respondent must sign and file:

(i) A statement setting forth when and how the complaint was satisfied;
and

(ii) A motion for dismissal of, or an amendment to, the complaint based on the satisfaction.

(2) The decisional authority may order the submission of additional information before acting on a motion for dismissal or an amendment under paragraph (c)(1)(ii) of this section.

DISCOVERY RULES (Rules 401-411)

Applicability (Rule 401)

(a) General rule. Except as provided in paragraph (b) of this section, this subpart applies to discovery in proceedings set for hearing under subpart E of this part, and to such other proceedings as the Commission may order.

(b) Exceptions. Unless otherwise ordered by the Commission, this subpart does not apply to:

(1) Requests for information under the Freedom of Information Act, 5 U.S.C. 552, governed by Part 388 of this chapter; or,

(2) Requests by the Commission or its staff who are not participants in a proceeding set for hearing under subpart E of this part to obtain information, reports, or data from persons subject to the Commission's regulatory jurisdiction; or

(3) Investigations conducted pursuant to Part 1b of this chapter.Sec. 385.402 Scope of discovery (Rule 402).

Initiation of Hearing (Rule 402)

(a) General. Unless otherwise provided under paragraphs (b) and (c) of this section or ordered by the presiding officer under Rule 410(c), participants may obtain discovery of any matter, not privileged, that is relevant to the subject matter of the pending proceeding, including the
existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, and the identity and location of persons having any knowledge of any discoverable matter. It is not ground for objection that the

information sought will be inadmissible in the Commission proceeding if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(b) Material prepared for litigation. A participant may not obtain discovery of material prepared in anticipation of litigation by another participant, unless that participant demonstrates a substantial need for the material and that substantially equivalent material cannot be obtained by other means without undue hardship. In ordering any such
discovery, the presiding officer will prevent disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney.

(c) Expert testimony. Unless otherwise restricted by the presiding officer under Rule 410(c), a participant may discover any facts known or opinions held by an expert concerning any relevant matters, not privileged. Such discovery will be permitted only if:

(1) The expert is expected to be a witness at hearing; or

(2) The expert is relied on by another expert who is expected to be a witness at hearing, and the participant seeking discovery shows a compelling need for the information and it cannot practicably be obtained by other means.

Methods of Discovery; General Provisions (Rule 403)

(a) Discovery methods. Participants may obtain discovery by data requests, written interrogatories, and requests for production of documents or things (Rule 406), depositions by oral examination (Rule 404), requests for inspection of documents and other property (Rule
407), and requests for admission (Rule 408).

(b) Discovery conferences.

(1) The presiding officer may direct the participants in a proceeding or their representatives to appear for one or more conferences, either separately or as part of any other prehearing conference in the proceeding under Rule 601(a), for the purpose of scheduling discovery, identifying discovery issues, and resolving discovery disputes. Except as provided in paragraph (b)(2) of this section, the presiding officer, upon the conclusion of a conference, will issue an order stating any and all decisions made and agreements reached during the conference.

(2) The Chief Administrative Law Judge may, upon a showing of extraordinary circumstances, waive the requirement to issue an order under paragraph (b)(1) of this section.

(c) Identification and certification of preparer. Each response to discovery under this subpart must:

(1) Identify the preparer or person under whose direct supervision the response was prepared; and

(2) Be under oath or, for representatives of a public or private corporation or a partnership or association or a governmental agency, be accompanied by a signed certification of the preparer or person
supervising the preparation of the response on behalf of the entity that the response is true and accurate to the best of that person's
knowledge, information, and belief formed after a reasonable inquiry.

(d) Supplementation of responses.

(1) Except as otherwise provided by this paragraph, a participant that has responded to a request for discovery with a response that was complete when made is not under a continuing duty to supplement that response to include information later acquired.

(2) A participant must make timely amendment to any prior response if the participant obtains information upon the basis of which the participant knows that the response was incorrect when made, or though correct when made is now incorrect in any material respect.
(3) A participant may be required to supplement a response by order of the presiding officer or by agreement of all participants.
(4) A participant may request supplementation of prior responses, if such request is permitted under the procedural schedule.

Depositions During Proceedings (Rule 404)

(a) In general.

(1) A participant may obtain the attendance for a deposition by oral examination of any other participant, an employee or agent of that participant, or a person retained by that participant as a potential witness, by providing a notice of intent to depose.

(2) Any participant may obtain the attendance of a nonparticipant for a deposition by oral examination by obtaining a subpoena, in accordance with Rule 409. For purposes of this rule, a Commission decisional employee, as defined in Rule 2201(a), is a nonparticipant.

(b) Notice.

(1) A participant seeking to take a deposition under this section must provide to all other participants written notice reasonably in advance of the deposition. The notice must be filed with the Commission and served on all participants. An original must be served on each person whose deposition is sought.

(2) A notice of intent under this section must:

(i) State the time and place at which the deposition will be taken, the name and address of each person to be examined, and the subject matter of the deposition; and

(ii) If known at the time that the deposition is noticed that its purpose is to preserve testimony, state that the deponent will be unable to testify at the hearing.

(3)(i) A notice of intent under this section or a subpoena under Rule 409 may name as the deponent a public or private corporation or a partnership or association or a governmental agency, and describe with reasonable particularity the matters on which examination is requested. Such organization must, in response, designate one or more officers, directors, or managing agents, or other persons to testify on its behalf, and set forth, for each person designated, the matters on which that person will testify.

(ii) A subpoena must advise any organization that is named as a deponent but is not a participant that it has a duty to designate a person to testify. Any person designated under this section must testify on matters known by, or reasonably available to, the organization.

(c) Taking of deposition.

(1) Each deponent must swear to or affirm the truth of the testimony given before any testimony is taken.

(2) Any participant may examine and cross-examine a deponent.

(3) Any objection made during the examination must be noted by the officer taking the deposition. After the objection is noted, the deponent must answer the question, unless a claim of privilege is asserted or the presiding officer rules otherwise.

(4) The deposition must be transcribed verbatim.

(d) Nonstenographic means of recording; telephonic depositions. Testimony at a deposition may be recorded by means other than stenography if all participants so stipulate or if the presiding officer, upon motion, so orders. Such stipulation or order shall designate the person before whom the deposition. will be taken, and the manner in which the deposition will be preserved, filed, and certified. Depositions may also be taken by telephone, if all participants so stipulate or the presiding officer, upon motion, orders.

(e) Officer taking deposition. Depositions must be taken before an officer authorized to administer oaths or affirmations by the laws of the United States or of the place where the deposition is held. A deposition may not be taken before an officer who is a relative or employee or attorney of any of the participants, or is financially or in any other way interested in the action.

(f) Submission to deponent.

(1) Unless examination is waived by the deponent, the transcription of the deposition must be submitted to the deponent for examination.

(2) If the deponent requests any changes in form or substance, the officer must enter the changes on the deposition transcript with a statement of the witness' reasons for the changes. The deponent must sign the deposition within 30 days after submittal to the deponent, unless the participants by stipulation waive the signing or the deponent cannot or will not sign. By signing the deposition the deponent certifies that the transcript is a true record of the testimony given.

(3) The officer who took the deposition must sign any deposition not signed by the deponent in accordance with this section and must state on the record that the signature is waived or that the deponent cannot or will not sign, accompanied by any reason given for a deponent's refusal to sign. If the officer complies with this paragraph, a deposition that is unsigned by the deponent may be used as though signed, unless the presiding officer rules otherwise.

(g) Certification and copies.

(1) The officer must certify on the transcript of the deposition that the deponent swore to or affirmed the truth of the testimony given and the deposition transcript is a true record of the testimony given by the deponent. The officer must provide the participant conducting the deposition with a copy of the transcription.

(2) Documents and things produced for inspection during the examination of the witness will, upon the request of a participant, be marked for identification and annexed to the deposition and the officer will certify the document or thing as the original offered during the deposition, or as a true and correct copy of the original offered.

(3) Copies of the transcript of a deposition may be purchased from the reporting service that made the transcription, subject to protections established by the presiding officer.

Use of Depositions (Rule 405)

(a) In general. During a hearing, the hearing of a motion, or an interlocutory proceeding under Rule 715, any part or all of a deposition taken pursuant to Rule 404, so far as admissible as though the witness were then present and testifying, may be used against any participant who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the provisions of this section.

(1) If the deponent is a witness at a hearing, any participant may use the deposition of that witness at the time of the witness' examination to contradict, impeach, or complete the testimony of that witness.

(2) The deposition of a participant or of any person who, at the time of taking the deposition, was an officer, director, or managing agent of a participant, or a person designated under Rule 404(b)(3) to testify on behalf of a participant may be used by another participant for any purpose.

(3) The deposition of any witness, whether or not a participant, may be used by a participant for any purpose, if the presiding officer finds that:

(i) The witness is dead;

(ii) The witness is unable to attend or testify because of age, illness, infirmity or imprisonment;

(iii) The participant offering the deposition is unable after the exercise of due diligence to procure the attendance of the witness by subpoena; or

(iv) Exceptional circumstances make it necessary in the interest of fairness with due regard to the importance of presenting the witness in open hearing, to allow use of the deposition.

(4) If only part of a deposition is offered in evidence by a participant, a participant may require the introduction of any other part which ought, in fairness, to be considered with the part introduced, and any adverse participant may introduce any other part.

(b) Objections to admissibility. No part of a deposition will constitute a part of the record in the proceeding, unless received in evidence by the Commission or presiding officer. Subject to paragraph (c) of this section, a participant may object to receiving into evidence all or part of any deposition for any reason that the evidence would be excluded if the deponent were present and testifying.

(c) Effect of errors and irregularities in depositions.

(1) Any objection to the taking of a deposition based on errors or irregularities in notice of the deposition is waived, unless written objection is promptly served on the participant giving the notice.

(2) Any objection to the taking of a deposition based on the disqualification of the officer before whom it is to be taken is waived, unless the objection is made before the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) Any objection to the competency of the witness or the competency, relevancy, or materiality of testimony is not waived by failure to make the objection before or during the taking of the deposition, unless the basis for the objection might have been removed
if the objection had been presented at the taking of the deposition.

(4) Any objection to errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions and answers, in the oath or affirmation, or in the conduct of participants, and errors of any kind that might be obviated, removed or cured if presented at the deposition, is waived unless objection is made at the taking of the deposition.

(5) Any objection based on errors or irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, endorsed, or otherwise dealt with by the officer is waived, unless the objection is made with reasonable promptness after the defect is, or with due diligence should have been, ascertained.

Data Requests, Interrogatories, and Requests for Production of Documents or Things (Rule 406)

(a) Availability. Any participant may serve upon any other participant a written request to supply information, such as responses to data requests and interrogatories, or copies of documents.

(b) Procedures.

(1) A request under this section must identify with specificity the information or material sought and will specify a reasonable time within which the matter sought must be furnished.

(2) Unless provided otherwise by the presiding officer, copies of any discovery request must be served upon the presiding officer and on all participants to the proceeding.

(3) Each discovery request must be answered separately and fully in writing.

(4) Responses to discovery requests are required to be served only on the participant requesting the information, Commission trial staff, and any other participant that specifically requests service. The presiding officer may direct that a copy of any responses be furnished to the presiding officer. Responses must be served within the time limit specified in the request or otherwise provided by the presiding officer.

(5) If the matter sought is not furnished, the responding participant must provide, in accordance with Rule 410, written explanation of the specific grounds for the failure to
furnish it.

Inspection of Documents and Other Property (Rule 407)

(a) Availability. On request, the presiding officer may order any other participant to:

(1) Permit inspection and copying of any designated documents (including writings, drawings, graphs, charts, photographs, sound recordings, computer tapes or other compilations of data from which information can be obtained) that are not privileged and that are in the possession, custody, or control of the participant to whom the order is directed;

(2) Permit inspection, copying or photographing, testing, or sampling of any tangible thing that is not privileged and that is in the possession, custody, or control of the participant to whom the order is directed; and

(3) Permit entry upon or into designated land, buildings, or other property in the possession, custody, or control of the participant to whom the order is directed for the purpose of inspecting, measuring, surveying, or photographing the property or any activity or operation that is not privileged and that is conducted in or upon the property.

(b) Procedures. A request for inspection of documents or property under this section must describe with reasonable particularity the documents or other property to which access is sought. The request must also specify a reasonable time, place, and manner of making the inspection.

Admissions (Rule 408)

(a) General rule. A participant may serve upon any other participant a written request for admission of the genuineness of any document or the truth of any matter of fact. The request must be served upon all participants.

(b) Procedures.

(1) Any request for admission of the genuineness of a document must be accompanied by a legible copy of the document, unless it was previously furnished, is in the possession of the recipient of the request, or is readily available for inspection and copying.

(2) The truth of specified matters of fact or the genuineness of the documents described in a request are deemed admitted unless, within 20 days after service of the request or any longer period designated in the request, the participant that receives the request serves upon the requesting participant a written answer or objection addressed to the
matters in the request.

(3) An answer must specifically admit or deny the truth of the matters in the request or set forth in detail the reasons why the answering participant cannot admit or deny the truth of each matter. A denial of the truthfulness of the requested admission must fairly discuss the substance of the requested admission and, when good faith requires that a participant qualify the answer or deny only a part of the matter of which an admission is requested, the participant must specify that which is true and qualify or deny the remainder. The answer must be served on all participants.

(c) Effect of admission. Any admission made by a participant under this section is for the purpose of the pending proceeding only, is not an admission for any other purpose, and may not be used against the participant in any other proceeding. Any matter admitted under this rule is conclusively established unless the presiding officer, on motion, permits withdrawal or amendment of the admission. The presiding officer may permit withdrawal or amendment of an admission, if the presiding officer finds that the presentation of the merits of the proceeding will be promoted and the participant who obtained the admission has failed to satisfy the presiding officer that withdrawal or amendment of the admission will prejudice that participant in maintaining his position in the proceeding.

Subpoenas (Rule 409)

(a) Issuance. On request, the presiding officer may issue a subpoena for the attendance of a witness at a deposition or hearing or for the production of documents. A request for a subpoena must be served on all participants.

(b) Service and return. A subpoena issued under this section must be served by personal service, substituted service, registered mail, or certified mail. A subpoena may be served by the marshal, by his deputy, or by any other person who is not a party or an employee of a party and is at least 18 years of age. If personal service is made by any person other than a United States marshal or deputy marshal, return of service must be accompanied by an affidavit to the Secretary or the presiding officer and must state the time and manner of service of the subpoena.

(c) Fees. Fees paid to subpoenaed persons will be in accordance with Rule 510(e).

(d) Objections. Objections to subpoenas must be made in accordance with Rule 410.

Objections to Discovery, Motions to Quash or to Compel, and Protective Orders (Rule 410)

(a) Objection to discovery—

(1) Notice of objections or motion to quash. A participant, or a recipient of a subpoena, who does not intend to comply with a discovery request must notify in writing the participant seeking discovery within a reasonable time in advance of the date on which a response or other action in conformance with the discovery request is due. A recipient of a subpoena may either provide a notice of objection or file a motion to quash.

(2) Objections to production of documents.

(i) Unless an objection to discovery under this section is based on the ground that production would impose an undue burden, the objecting participant must provide the participant seeking discovery with a schedule of items withheld and a statement of:

(A) The character and specific subject matter of each item; and

(B) The specific objection asserted for each item.

(ii) If an objection under this section is based on the ground that production of the requested material would impose an undue burden, the objecting participant must provide the participant seeking discovery with a description of the approximate number of documents that would have to be produced and a summary of the information contained in such documents.

(3) Objections to other discovery requests. If the discovery to which objection is made is not a request for documents, the objection must clearly state the grounds on which the participant bases its objection.

(4) Objections to compile or process information. The fact that information has not been compiled or processed in the form requested is not a basis for objection unless the objection presents grounds for limiting discovery under paragraph (c) of this section.

(b) Motions to compel. Any participant seeking discovery may file a motion to compel discovery, if:

(1) A participant to whom a data request is made or upon whom an interrogatory is served under Rule 406 fails or refuses to make a full, complete, and accurate response;

(2) A person named in a notice of intent to take a deposition or a subpoena fails or refuses to appear for the deposition;

(3) An organization named in a notice of intent to take a deposition fails or refuses to designate one or more persons to testify on its behalf under Rule 404(b)(3);

(4) A deponent fails or refuses to answer fully, completely, and accurately a question propounded or to sign the transcript of the testimony as required by Rule 404(f)(2);

(5) A participant upon whom a request for admissions is served fails or refuses to respond to the request in accordance with Rule 408(b); or

(6) A participant upon whom an order to produce or to permit inspection or entry is served under Rule 407 fails or refuses to comply with that order.

(c) Orders limiting discovery. A presiding officer may, by order, deny or limit discovery or restrict public disclosure of discoverable matter in order to:

(1) Protect a participant or other person from undue annoyance, burden, harassment or oppression;

(2) Prevent undue delay in the proceeding;

(3) Preserve a privilege of a participant, person, or governmental agency;

(4) Prevent a participant from requiring another participant to provide information which is readily available to the requesting participant from other sources with a reasonable expenditure of effort given the requesting participant's position and resources;

(5) Prevent unreasonably cumulative or duplicative discovery requests; or

(6) Provide a means by which confidential matters may be made available to participants so as to prevent public disclosure. Material submitted under a protective order may nevertheless be subject to Freedom of Information Act requests and review.

(d) Privilege—

(1) In general.

(i) In the absence of controlling Commission precedent, privileges will be determined in accordance with decisions of the Federal courts with due consideration to the Commission's need to obtain information necessary to discharge its regulatory responsibilities.

(ii) A presiding officer may not quash a subpoena or otherwise deny or limit discovery on the ground of privilege unless the presiding officer expressly finds that the privilege claimed is applicable. If a presiding officer finds that a qualified privilege has been established, the participant seeking discovery must make a showing sufficient to warrant discovery despite the qualified privilege.

(iii) A presiding officer may issue a protective order under Rule 410(c) to deny or limit discovery in order to preserve a privilege of a participant, person, or governmental agency.

(2) Of the Commission.

(i) If discovery under this subpart would require the production of Commission information, documents, or other matter that might fall within a privilege, the Commission trial staff must identify in writing the applicable privilege along with the matters claimed to be privileged or the individuals from whom privileged information is sought, to the presiding officer and the parties.

(ii) If the presiding officer determines that the privilege claimed for the Commission is applicable, the Commission information, documents, or other matter may not be produced. If the presiding officer determines that no privilege is applicable, that a privilege is waived, or that a qualified privilege is overcome, the presiding officer will certify the matter to the Commission in accordance with Rule 714. Certification to the Commission under this paragraph must describe the material to be disclosed and the reasons which, in the presiding officer's view, justify disclosure. The information will not be disclosed unless the Commission affirmatively orders the material disclosed.

Sanctions (Rule 411)

(a) Disobedience of order compelling discovery. If a participant or any other person fails to obey an order compelling discovery, the presiding officer may, after notice to the participant or person and an opportunity to be heard, take one or more of the following actions, but may not dismiss or otherwise terminate the proceeding:

(1) Certify the matter to the Commission with a recommendation for dismissal or termination of the proceeding, termination of that participant's right to participate in the proceeding, institution of civil action, or any other sanction available to the Commission by law;

(2) Order that the matters to which the order compelling discovery relates are taken as established for the purposes of the proceeding in accordance with the position of the participant obtaining the order;

(3) Order that a participant be precluded from supporting or opposing such positions or introducing such matters in evidence as the presiding officer designates;

(4) Order that all or part of any pleading by a participant be struck or that the proceeding or a phase of the proceeding be stayed until the order compelling discovery is obeyed; and

(5) Recommend to the Commission that it take action under Rule 2102 against a representative of the participant if the presiding officer believes that the representative has engaged in unethical or improper professional conduct.

(b) Against representative of a participant. If the person disobeying an order compelling discovery is an agent, officer, employee, attorney, partner, or director of a participant, the presiding officer may take any of the actions described in paragraph (a) against that participant.

ANSWERS & INTERVENTIONS (Rules 213 & 214)

Answers (Rule 213)

(a) Required or permitted.

(1) Any respondent to a complaint or order to show cause must make an answer, unless the Commission orders otherwise.

(2) An answer may not be made to a protest, an answer, a motion for oral argument, or a request for rehearing, unless otherwise ordered by the decisional authority. A presiding officer may prohibit an answer to a motion for interlocutory appeal. If an answer is not otherwise permitted under this paragraph, no responsive pleading may be made.

(3) An answer may be made to any pleading, if not prohibited under paragraph (a)(2) of this section.

(4) An answer to a notice of tariff or rate examination must be made in accordance with the provisions of such notice.

(b) Written or oral answers. Any answer must be in writing, except that the presiding officer may permit an oral answer to a motion made on the record during a hearing conducted under subpart E or during a conference.

(c) Contents.

(1) An answer must contain a clear and concise statement of:

(i) Any disputed factual allegations; and

(ii) Any law upon which the answer relies.

(2) When an answer is made in response to a complaint, an order to show cause, or an amendment to such pleading, the answerer must, to the extent practicable:

(i) Admit or deny, specifically and in detail, each material allegation of the pleading answered; and

(ii) Set forth every defense relied on.

(3) General denials of facts referred to in any order to show cause, unsupported by the specific facts upon which the respondent relies, do not comply with paragraph (a)(1) of this section and may be a basis for summary disposition under Rule 217, unless otherwise required by statute.

(4) An answer to a complaint must include documents that support the facts in the answer in possession of, or otherwise attainable by, the respondent, including, but not limited to, contracts and affidavits. An answer is also required to describe the formal or consensual process it proposes for resolving the complaint.

(5)

(i) A respondent must submit with its answer any request for privileged treatment of documents and information under Sec. 388.112 of this chapter and a proposed form of protective agreement. In the event the respondent requests privileged treatment under Sec. 388.112 of this chapter, it must file the original and three copies of its answer with the information for which privileged treatment is sought and 11 copies of the pleading without the information for which privileged treatment is sought. The original and three

copies must be clearly identified as containing information for which privileged treatment is sought.

(ii) A respondent must provide a copy of its answer without the privileged information and its proposed form of protective agreement to each entity that has either been served pursuant to Sec. 385.206 (c) or whose name is on the official service list for the proceeding compiled by the Secretary.

(iii) The complainant and any interested person who has filed a motion to intervene may make a written request to the respondent for a copy of the complete answer. The request must include an executed copy of the protective agreement and, for persons other than the complainant, a copy of the motion to intervene. Any person may file an objection to the proposed form of protective agreement.

(iv) A respondent must provide a copy of the complete answer to the requesting person within 5 days after receipt of the written request and an executed copy of the protective agreement.

(d) Time limitations.

(1) Any answer to a motion or to an amendment to a motion must be made within 15 days after the motion or amendment is filed, unless otherwise ordered.

(2) Any answer to a pleading or amendment to a pleading, other than a complaint or an answer to a motion under paragraph (d)(1) of this section, must be made:

(i) If notice of the pleading or amendment is published in the Federal Register, not later than 30 days after such publication, unless otherwise ordered; or

(ii) If notice of the pleading or amendment is not published in the Federal Register, not later than 30 days after the filing of the pleading or amendment, unless otherwise ordered.

(e) Failure to answer.

(1) Any person failing to answer a complaint may be considered in default, and all relevant facts stated in such complaint may be deemed admitted.

(2) Failure to answer an order to show cause will be treated as a general denial to which paragraph (c)(3) of this section applies

Intervention (Rule 214)

(a) Filing.

(1) The Secretary of Energy is a party to any proceeding upon filing a notice of intervention in that proceeding. If the Secretary's notice is not filed within the period prescribed under Rule 210(b), the notice must state the position of the Secretary on the
issues in the proceeding.

(2) Any State Commission is a party to any proceeding upon filing a notice of intervention in that proceeding, if the notice is filed within the period established under Rule 210(b). If the period for filing notice has expired, a State Commission must comply with the rules for motions to intervene applicable to any person under paragraph (a)(3) of this section including the content requirements of paragraph (b) of this section.

(3) Any person, other than the Secretary of Energy or a State Commission, seeking to become a party must file a motion to intervene.

(b) Contents of motion.

(1) Any motion to intervene must state, to the extent known, the position taken by the movant and the basis in fact and law for that position.

(2) A motion to intervene must also state the movant's interest in sufficient factual detail to demonstrate that:

(i) The movant has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action;

(ii) The movant has or represents an interest which may be directly affected by the outcome of the proceeeding, including any interest as a:

(A) Consumer,

(B) Customer,

(C) Competitor, or

(D) Security holder of a party; or

(iii) The movant's participation is in the public interest.

(3) If a motion to intervene is filed after the end of any time period established under Rule 210, such a motion must, in addition to complying with paragraph (b)(1) of this section, show good cause why the time limitation should be waived.

(c) Grant of party status.

(1) If no answer in opposition to a timely motion to intervene is filed within 15 days after the motion to intervene is filed, the movant becomes a party at the end of the 15 day
period.

(2) If an answer in opposition to a timely motion to intervene is filed not later than 15 days after the motion to intervene is filed or, if the motion is not timely, the movant becomes a party only when the motion is expressly granted.

(d) Grant of late intervention.

(1) In acting on any motion to intervene filed after the period prescribed under Rule 210, the decisional authority may consider whether:

(i) The movant had good cause for failing to file the motion within the time prescribed;

(ii) Any disruption of the proceeding might result from permitting intervention;

(iii) The movant's interest is not adequately represented by other parties in the proceeding;

(iv) Any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; and

(v) The motion conforms to the requirements of paragraph (b) of this section.

(2) Except as otherwise ordered, a grant of an untimely motion to intervene must not be a basis for delaying or deferring any procedural schedule established prior to the grant of that motion.

(3)

(i) The decisional authority may impose limitations on the participation of a late intervener to avoid delay and prejudice to the other participants.

(ii) Except as otherwise ordered, a late intervener must accept the record of the proceeding as the record was developed prior to the late intervention.

(4) If the presiding officer orally grants a motion for late intervention, the officer will promptly issue a written order confirming the oral order.